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No. 83-1811

IN THE

Supreme Court of the United States

October Term, 1983

R. J. WILLIAMS COMPANY,
RICHARD J. WILLIAMS,
FIREMAN'S FUND
INSURANCE COMPANY,
Petitioners,

v.

FORT BELKNAP HOUSING AUTHORITY,
an Indian Housing Authority
Respondent,

v.

WILLIAMS BROTHERS CONTRACTORS,
Third Party Defendant.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

I.

Can a federal District Court obtain federal question jurisdiction pursuant to 28 U.S.C. §§ 1331 and 42 U.S.C. § 1983 in a contractual dispute arising solely upon an Indian reservation where there is alleged substantial claim to constitutional protection by non-Indians against a Tribally created Court because actions of the Tribal Court are not subject to the U.S. Constitution and because Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1341 vests Indian Tribal Courts with exclusive jurisdiction to adjudicate disputes between Indians and non-Indians, except rights that can be raised by *habeas corpus* petition?

II.

Can a federal District Court obtain diversity jurisdiction pursuant to 28 U.S.C. § 1331 where the assumption of diversity jurisdiction would impinge upon Tribal self-government where the Tribal Court did not have an opportunity to decide its jurisdiction because of the anticipatory action filed in federal District Court?

PARTIES TO THE PROCEEDING

Petitioners:	R. J. Williams Company, a Washington partnership.
	Richard J. Williams, a resident of the State of Washington.
	Fireman's Fund Insurance Company, a corporation incorporated in California.
Respondent:	Fort Belknap Housing Authority, an Indian Housing Authority, created pursuant to Tribal law.
Third Parties:	Williams Brothers Contractors, a joint venture consisting of two Montana corporations.

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OPINION

The District Court did not render an opinion. The District Court's Findings and Conclusions are set out as Appendix A to Petitioners' Petition for Writ of Certiorari. The opinion of the Court of Appeals is officially reported in *R. J. Williams Co. vs. Fort Belknap Housing Authority*, 719 F.2d 979 (9th Cir. 1983), and is set out as Appendix B to Petitioners' Petition for Writ of Certiorari.

JURISDICTION

The judgment of the Court of Appeals reversing the District Court was entered on October 31, 1983. Petition for Rehearsing and Suggestion for Rehearsing En Banc was denied by the Ninth Circuit on December 28, 1983. The jurisdiction of this Court was invoked pursuant to 28 U.S.C. § 2101 (c).

STATEMENT OF THE CASE

A. Respondent's Concise Statement Of The Facts

The Respondent Fort Belknap Housing Authority is an Indian housing authority on the Fort Belknap Indian Reservation, created by Tribal law and functioning pursuant to Tribal law. It is an entity separate from the tribal government. The Tribal government of the Fort Belknap Indian Community created the housing authority pursuant to its Ordinance No. 2-77.

The Petitioners are R. J. Williams Co., a partnership doing business as a general contractor whose partners are Tom Williams and R. J. Williams, citizens of the State of Washington and President of Williams Brothers Building Contractors, a joint venture operation located in the State of Montana; Firemans Fund Insurance Company, a corporation incorporated in and under the laws of the State of California; Williams Brothers Building Contractors, the third party Defendant, a joint venture of G. R. Construction Company, a Montana corporation, and Havre Ready-Mix, Inc., a Montana corporation.

This case was precipitated by a dispute between the Petitioners Richard J. Williams, R. J. Williams Co. and Williams Brothers Building Contractors and the Fort Belknap Housing Authority when the Petitioners failed to complete warranty items and punch lists pursuant to the parties' construction contract for construction of 50 single-family houses located upon the Fort Belknap Indian Reservation, Montana.

The factual issues as to the contractual performance of each respective party were determined by the United States District Court for Montana, which the Ninth Circuit subsequently determined had no jurisdiction in the matter. The District Court's assumption of jurisdiction had been contested by the Respondent throughout the course of the District Court's proceedings.

Williams Brothers Building Contractors, despite contract language agreeing to complete and correct deficiencies in its work and materials, and despite numerous attempts by the Fort Belknap Housing Authority to negotiate punch lists specifying the contractor's deficiencies, refused to correct most of the deficiencies brought to its attention by the Housing Authority over a two year period.

In March of 1980, the Fort Belknap Housing Authority filed a complaint and request for writ of attachment in the Fort Belknap Indian Community Tribal Court. The Fort Belknap Indian Community Tribal Court issued a writ of attachment causing the attachment of the contractor's equipment and supplies. The parties stipulated to a ten day extension of time for the contractors to file a brief in support of its April motion to dismiss the writ or attachment. The brief was not filed with the Tribal Court until four months later. The contractor then filed an anticipatory action in federal District Court before a decision was issued in the Tribal Court relative to jurisdiction over the contract dispute.

The District Court held that it had diversity and federal question jurisdiction over the subject matter. After a trial on the merits, the District Court found that the Fort Belknap Tribal Court had no jurisdiction over Petitioners and the attachment denied Petitioners' due process of law. The District Court awarded in excess of $98,000 to Petitioners and $5,000 to the Housing Authority on its counterclaim for breach of contract.

On appeal, the United States Court of Appeals for the Ninth Circuit reversed the District Court holding that Petitioners' had not stated a "federal claim for which relief can be granted" under 28 U.S.C. § 1331; that Indian Tribes are "separate sovereigns pre-existing the Constitution," and therefore are unconstrained by constitutional limitations which are placed upon federal or state authority; the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1341, did not authorize a civil cause of action in federal court other than habeas corpus; there is no jurisdiction in federal court under 42 U.S.C. § 1983 for alleged deprivation of constitutional rights under color of tribal law because the tribal government of the Fort Belknap Indian Community has not relinquished its sovereign self-governmental powers and therefore is not constrained by the provisions of the fourteenth amendment.

The Ninth Circuit, on the issue of diversity jurisdiction, examined the citizenship of each party and determined that complete diversity existed. The Court also found that the 'significant contacts' test, substantial activities giving rise to a dispute arising outside the reservation, was not met. Further, the Ninth Circuit went on to discuss interference with Tribal self-government and willingness of state to entertain the action and then determined that this case involves a genuine issue of tribal ordinance construction which must be left to the Fort Belknap Tribal Court for resolution.

B. Clarification of Petitioners' Concise Statement of the Facts

The Petitioners' presentation of the facts in this matter was less than candid and was intended to present a situation which differs starkly from reality. It is unfortunate that Petitioners' presentation should require this clarification, but the Respondent, Fort Belknap Housing Authority, is compelled by Petitioners' deft mingling of the District Court's findings of fact and of the Ninth Circuit's opinion.

The Petitioners have incorrectly designated the Respondent as 'a Montana corporation' in the caption to their Petition. The Ninth Circuit very specifically noted that "The Fort Belknap Housing Authority ("Housing Authority") is an entity created by tribal law of the Fort Belknap Indian Community and established in accordance with 42 U.S.C. § 1436 et seq. and 24 C.F.R. pt. 805." 719 F. 2d at 980 (9th Cir. 1983). It further stated that the Fort Belknap Housing Authority was a "...Montana citizen for *diversity purposes.*" 719 F. 2d at 982 n. 2 (9th Cir. 1983), (Emphasis added.) It did not state that it was a "federally created Montana corporation." This was an obvious attempt to make palatable the application of Montana law to a conflict wholly within the jurisdiction of the Fort Belknap Indian Community.

The Petitioners have inferred that the Fort Belknap Housing Authority, displeased with the District Court's decision, subsequently appealed and only then raised the matter of jurisdiction. (Petition for a Writ of Certiorari, p. 1). Jurisdiction was bitterly contested throughout the proceedings before the District Court. Having lost the jurisdictional issues before the District Court, the Fort Belknap Housing Authority was compelled to complete this matter on its merits before having the jurisdictional determination rectified by the Ninth Circuit. The question of jurisdiction was not an afterthought.

Petitioners stated that Petitioners' property was seized and converted without prior notice or opportunity to be heard *by the Fort Belknap Indian Housing Authority...*". (Petition for a Writ of Certiorari, p. 1 Emphasis added). In fact, the tribally chartered Fort Belknap Housing Authority petitioned the Fort Belknap Indian Community Tribal Court for a writ of attachment as would any entity or citizen so petition a court in any jurisdiction. The writ was issued by the Fort Belknap Indian Community Tribal Court. Petitioners' imprecise statement would make it appear that the Fort Belknap Housing Authority allegedly deprived Petitioners of prior notice or opportunity to be heard.

The Ninth Circuit determined that the "...appellees' asserted federal claims are all challenges to tribal government action, but the tribal court is not party to the suit." 719 F.2d 981 (9th Cir. 1983) Petitioners' statement that the Ninth Circuit's determination was "...made without specific support in the factual determinations of the District Court..." (Petition for Writ of Certiorari, p. 2) is hardly candid. The District Court's assumption of jurisdiction (see subparagraph (g), A-3, Petition for a Writ of Certiorari) explicitly found that the "Fort Belknap Tribal Court, acting at the request of the Tribal Housing Authority ...had no jurisdiction to do so..." The Ninth Circuit concluded correctly that the court issues a writ upon petition by a party, not the reverse. The Fort Belknap Housing Authority did not, and could not have committed any alleged constitutional violation.

Petitioner next asserted that "The Ninth Circuit did not acknowledge any difference between the Housing Authority and the tribe itself... on the theory that actions of Housing Authority taken under color of tribal law are beyond the reach of 42 U.S.C. § 1983." (Petition for Writ of Certiorari. p. 4). This is simply a mis-statement of the Ninth Circuit's opinion and a misrepresentation of its holding. Nowhere in its opinon did the Ninth Circuit refer to 'actions of the Fort Belknap Housing Authority taken under color of tribal law.' The Fort Belknap Authority petitioned the Fort Belknap Indian Community Tribal Court for relief, which it was granted. The actions of the Tribal Court, taken under color of tribal law, are what the Ninth Circuit referred to as beyond the reach of 42 U.S.C. § 1983. 719 F.2d at 982 (9th Cir. 1983)

Why A Petition For A Writ of Certiorari Should not be Granted

The Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1341, was passed by Congress to impose certain restrictions upon Tribal governments that were similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment. As separate sovereigns pre-existing the federal Constitution, Tribes were unconstrained by the constitutional limitations on federal or state authority. The only remedial provision expressly supplied by Congress was the privilege of the writ of habeas corpus.

The question herein does not turn on the amenability of a Tribally created housing authority to the constraints of the U.S. Constitution. The actions complained of by Petitioners were the issuance of a writ of attachment and the attachment of Petitioners' property by a Tribal court. Questioning whether or not an Indian housing authority is amenable to constraints of the U.S. Constitution is deliberately evasive and unresponsive to the action which started this dispute. The Tribal court was the only entity that could have issued a writ and ordered attachment of Petitioners' property. The Housing Authority did not and could not have accomplished that act. It merely petitioned the Tribal Court for relief in a dispute of a contract wholly entered into, performed, and breached on the Fort Belknap Indian Reservation. A determination of Tribal Court jurisdiction does not rest on a decision as to an Indian housing authority's exemption from U.S. constitutional restraints. The Ninth Circuit stated very plainly that "...appellees' asserted federal claims are all challenges to tribal government action, but the tribal court is not party to the suit." 719 F. 2d 982 (9th Cir. 1983).

Only the Tribal court can determine its own jurisdiction over this matter. Petitioners have attempted to block that determination by filing an anticipatory action in federal court. The Petitioners have never been denied access to the Fort Belknap Indian Community Tribal Court. Pursuant to the Indian Civil Rights Act, a federal court is precluded from making that jurisdiction determination for a Tribal court. No federal constitutional right attaches to actions by a Tribal government, except the privilege of habeas corpus. Thus no federal claim for which relief can be granted exists. Even further removed from such consideration is a tribally created housing authority which petitions a Tribal court for relief. Petitioners have attempted to raise their own refusal to use Tribal court to a puzzling level of constitutional dimension, rather than obviate their perceived problems by using that Tribal court. Tribal sovereignty is not a mere notion and has not blurred the rights of the non-Indian petitioners herein because they too are protected by the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1341.

ARGUMENT

A. There is no federal question jurisdiction nor are there or can there be a deprivation of Petitioners (non-Indians) constitutional rights by the Fort Belknap Housing Authorities.

The Petitioners in their Petition for Writ of Certiorari, Argument, A., pp 5-10, have confused the legal issues in this case by attempting to comingle constitutional law, federal question jurisdiction and the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1341. The Petitioners have characterized these legal issues, particularly those specifically sustaining Tribal self-government and jurisdiction, in an attempt to bolster their argument that federal question jurisdiction exists. In so doing, the Petitioners have overlooked or ignored the long standing principles of federal Indian law with respect to sovereignty, self-government and Tribal jurisdiction.

Petitioners are asking this Court to legislate new law in the area of federal Indian law which is the sole preogative of the United States Congress under its plenary power. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 L.Ed. 2d, 98 S. Ct. 1670 (1978). In order to grasp the significance and intricacies of federal Indian law it is important to examine each of these legal issues rather than combine them as Petitioners have done because of their perceived notion of what the law should be.

The Ninth Circuit held that Petitioners' alleged federal claims are all challenges to Tribal governmental action of the Tribal court and Petitioners have stated no federal claim pursuant to 28 U.S.C. § 1331 for which relief can be granted. The underlying dispute in this case arises out of a contract to construct houses upon the Fort Belknap Indian Reservation. The case is a simple breach of a consensual contract and in the case of *Mescalero Apache Tribe v. Martinez*, 519 F. 2d 479 (C.A. 10th, 1975), the Tenth Circuit held that a simple breach of contract action is not sufficient to raise a federal question pursuant to 28 U.S.C. § 1331. *Littell vs. Nakai*, 344 F. 2d 486

(9th Cir. 1965); *Hot Oil Service, Inc. v. Hall*, 366 F. 2d 295 (9th Cir. 1966). The Ninth Circuit court in *Littell*, supra, 344 F. 2d at 488 stated:

> But "[a] suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law upon the determination of which the result depends." Schulthis v. McDougla, supra, at page 569, 32 S.Ct. at page 706. From the pleading it is apparent that the "real substance of the controversy" [Gully v. First Nat'l Bank, 299 U.S. 109, 114, 57 S.Ct. 96, 8 L.Ed. 70 (1936)] centers upon the contract and its construction rather than the statutory basis for the contract, and as said in Puerto Rico v. Russel & Co., 288 U.S. 476, 483, 53 S.Ct. 447, 450, 77 L.Ed. 903 (1933) "The federal nature of the right to be established is decisive—not the source of the authority to establish it."

The District Court held that the Petitioners were denied the most fundamental elements of due process, notice and hearing when the tribal court ordered the seizure of Petitioners' property. It is well settled in the law that the United States constitutional provisions of due process do not apply to tribal courts on Indian Reservations. *Talton v. Mayes*, 163 U.S. 376 (1896). However, non-Indians as well as Indians who are involved in transactions with Indians residing upon an Indian Reservation are protected by the due process and equal protection provisions of the 1968 Indian Civil Rights Act. 25 U.S.C. § 1302. In citing *Trans-Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe*, 634 F. 2d 474 (9th Cir. 1980), the District Court failed to note that this Court and lower federal courts have held that "*Constitutional* guarantees, however, are not applicable to the exercise of governmental powers by an Indian Tribe except to the extent that they are made explicitly binding by the Constitution or are imposed by Congress." See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 L.Ed. 2d 106, 98, S.Ct. 1670 (1978); *Talton v. Mayes*, 163 U.S.

376, 16 S.Ct. 986, 41 L.Ed. 196 (1896); *Wardle v. Ute Indian Tribe*, 623 F. 2d. 670 (10th Cir. 1980); *Janis v. Wilson*, 521 F. 2d 724 (8th Cir. 1975); *Groundhog v. Keeler*, 422 F. 2d 674 (10th Cir. 1970); *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F. 2d 529 (8th Cir. 1967); *Native American Church v. Navajo Tribal Council*, 272 F. 2d 131 (10th Cir. 1959); *Barta v. Oglala Sioux Tribe*, 259 F. 2d 553 (8th Cir. 1958) cert, denied, 358 U.S. 932, 79 S.Ct. 320, 3 L.Ed. 2d 304 (1959); *Martinez v. Southern Ute Tribe of Southern Ute Reservation*, 249 F. 2d 915 (10th Cir. 1957) cert. denied, 356 U.S. 960, 78 S.Ct. 998, 2 L.Ed. 2d 1067 (1958). (Emphasis added). The Court further held that the Indian Civil Rights Act imposes *"a form of due process limitation* upon Indian Tribes" but that the Supreme Court had reaffirmed the principal of *Talton v. Mayes*, supra, that the "Constitution is generally *not* binding upon Indian Tribes." *Trans-Canada v. Muckleshoot*, supra, at 477. (Emphasis added).

Furthermore, the District Court improperly found that the Petitioners did not have access to a legitimate tribal forum. The record is clear that the Tribal Court was available to Petitioners but they refused to pursue in good faith the Tribal Court action and instead chose an anticipatory action in federal court. As the Ninth Circuit held in *Trans-Canada v. Muckleshoot*, supra, the Indian Civil Rights Act imposed a form of due process limitation upon Indian Tribes. It further held that the Fifth and Fourteenth Amendments are not applicable to tribal action. Even if the alleged violations in this matter rise to the proportions of the due process standards of the Indian Civil Rights Act, it must be remembered that they cannot rise to proportions of the due process standards of the federal Constitution. But since the sole remedy in federal court for a violation under 25 U.S.C. § 1302 (8) is federal habeas corpus relief, the federal court would not be in a position to make a determination if such a violation had occurred. Thus, 28 U.S.C. § 1331 cannot be used to infer federal jurisdiction in this matter.

The District Court, in holding that the Petitioners had a federal right to due process, a due process that it merely

assumed was identical to that of the Fifth and Fourteenth Amendments, also held that Petitioners' property was "taken" and that they were without a method to challenge that action. Petitioners' property was not taken and converted. They made no real effort to determine if the attachment was proper. Had Petitioners pursued the matter in Tribal Court, which was available to them, rather than compounding a contract dispute by filing an anticipatory suit in federal court alleging lack of jurisdiction, Richard J. Williams, R. J. Williams Company, and Williams Brothers Building Contractors would not be trying to recoup losses that they themselves caused.

Further, this Court has held that tribal courts or tribal forums are available to those Indians and non-Indians for adjudicating disputes affecting important personal and property rights and interests. *Santa Clara Pueblo v. Martinez*, 56 L.Ed. 2d at 119, 120. This Court in *Martinez* stated:

> "...Tribal forums are available to vindicate rights created by the ICRA, and § 1302 has the substantial and intended effect of changing the law which these forums are obliged to apply. Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests *of both Indians and non-Indians*. See, e.g., Fisher v. District Court, 424 US 382, 47 L Ed 2d 106, 96 S Ct 943 (1976); Williams v. Lee, 358 US 217, 3 L Ed 2d 251, 79 S Ct 269 (1959). See also Ex parte Crow Dog, 109 US 556, 27 L Ed 1030, 3 S Ct 396 (1883). Nonjudicial tribal institutions have also been recognized as competent law-applying bodies. See United States v. Mazurie, 419 US 544, 42 L Ed 2d 706, 95 S Ct 710 (1975)..." (Emphasis added).

The argument of the Petitioners, that they were without a forum was used by them for the purpose of forum shopping and circumventing the Fort Belknap Tribal Court.

Petitioners attempt to characterize this matter as a 42 U.S.C. § 1983 claim and thereby vesting the district court with jurisdiction under 28 U.S.C. § 1343 (3) ignores the jurisdiction prerequisite of action under color of state law. The long line of cases enunciating the sovereign status of tribal

governments are decisively against Petitioners' argument that the attachment issued out of the Fort Belknap Indian Community Tribal Court was under color of State law. *United States v. Wheeler*, 435 U.S. 313, 55 L. Ed. 2d 303, 98 S.Ct. 1079 (1978) decisively settled the issue of the independent sovereign status of an Indian Tribe when it held:

> "But our cases recognize that the Indian tribes have not given up their full sovereignty. We have recently said: 'Indian tribes are unique aggregations possessing attributes of sovereignty over both their members *and their territory*...[They] are a good deal more than 'private, voluntary organizations." United States v. Mazurie, 419 US 544, 42 L Ed 2d 706, 95 S Ct 710; see also Turner v. United States, 248 US 354, 354-355, 63 L Ed 291, 39 S Ct 109; Cherokee Nation v. Georgia, supra, at 16-17, 8 L Ed 25. (Emphasis added). The Indian Tribes are 'distinct political communities' with their own mores and laws...*United States v. Wheeler* at 331 (citations ommitted)."

Similarly, pursuant to the mandate of PL 280 and 25 U.S.C. 1300 et seq., the Indian Civil Rights Act, which require affirmative and specific actions for the assumption of jurisdiction by a state over a reservation, in addition to the disclaimer by the State of Montana of any jurisdiction over Indian Reservations, ("Nothing in this part shall confer jurisdiction upon the State of Montana to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein, M.C.A. 1981 2-1-304(3) there is no civil jurisdiction by the State of Montana on the Fort Belknap Indian Reservation. The suggestion that the Fort Belknap Indian Community Tribal Court was acting under color of State law, which suggests that it is vested with some authority from the State of Montana, borders on the preposterous. The Fort Belknap Indian Community Tribal Court is not mandated to look to state laws for guidance in deciding an issue. The Fort Belknap Indian Community Tribal Court has several options to turn to when it reaches a stage where it is creating its own new substantive law.

B. The Indian Civil Rights Act of 1968, 25 U.S.C. § 1301 et seq., does not grant access to federal district courts other than habeas corpus relief.

Federal law has long recognized that because Indian tribes were sovereigns pre-dating the Constitution, they have been unconstrained by the limitations in the federal Constitution on federal and state authority. *Talton v. Mayes*, supra. Lower federal courts over the years extended the *Talton* holding to other provisions of the Bill of Rights: due process clause of the Fourteenth Amendment; freedom of religion under the First and Fourteenth Amendment; due process under the Fifth Amendment.

When federal constitutional provisions have been applied, the courts have found that a tribal court is so pervasively regulated by a federal agency it was in effect a federal instrumentality. *Colliflower v. Garland*, 342 F. 2d 369 (9th Cir. 1965). However, as the record in this case shows, Petitioners' reliance on *Colliflower*, supra, to force the applicability of federal law into this matter, is misplaced.

The Tribal Court of the Fort Belknap Indian Community is not an instrumentality nor an arm of the federal government. The Tribal Court does not function pursuant to the federal Code of Indian Offenses but functions pursuant to the tribal Law and Order Code enacted by the Fort Belknap Indian Community tribal government. See *United States v. Wheeler*, 435 U.S. 313, 55 L. Ed. 2d 303, 98 S. Ct. 1079, (1978). The court in *Wheeler*, supra, citing *Talton v. Mayes*, supra, held that a tribe acts as an independent sovereign, not as an arm of the Federal Government.

Moreover, the Fort Belknap Indian Community Tribal Court receives its funding from the Fort Belknap Indian Community tribal government; the tribal judges are selected and appointed by the tribal government; and the Court functions pursuant to laws enacted by the tribal government. This situation has existed since 1970.

The Indian Civil Rights Act of 1968 was the result of Congress' exercise of its authority to modify the powers of local self-government of Indian tribes by imposing certain restric-

tions on Tribal governments that were similar to the restrictions contained in the Bill of Rights and the Fourteenth Amendment.

In concluding that the sole federal remedy for alleged violation of the Indian Civil Rights Act was an application for federal habeas corpus relief, this Court found that "...implication of federal remedy in addition to habeas corpus is not plainly required to give effect to Congress' objective of extending constitutional norms to tribal self-government." *Martinez*, supra, at 436 U.S. 65. This Court cited no federal cause of action other than habeas corpus because additional actions would be at odds with the congressional goal of protecting tribal self-government. A Tribal court's opportunity to determine its own jurisdiction over a matter rather than subverting that opportunity by allowing a federal court to find a cause of action under the Indian Civil Rights Act, is precisely one of the dual objectives of Congress in passing the Indian Civil Rights Act.

As this Court noted in its comprehensive interpretation of the Act in *Martinez*, 436 U.S. 62:

> "Two distinct and competing purposes are manifest in the provisions of the ICRA: In addition to its objective of strengthening the position of individual tribal members vis-a-vis the tribe, Congress also intended to promote the well-established federal "policy of furthering Indian self-government." [citations omitted]. This commitment to the goal of tribal self-determination is demonstrated by the provisions of Title I itself.

This Court also noted that rather than providing for a wholesale incorporation of constitutional requirements to tribal governments, Congress selectively incorporated, and in some instances modified, the provisions of the Bill of Rights so as to "fit the unique, political, cultural, and economic needs of tribal governments." 436 U.S. at 62. This Court held that the other titles of the ICRA manifest a "congressional purpose to protect tribal sovereignty from undue interference," reflected particularly in the provisions of the Act holding that states "may not assume civil or criminal jurisdiction

over 'Indian Country' without prior consent of the tribe." 25 U.S.C. §§ 1321-26, 436 U.S. at 63-64. The protections of the ICRA extend to all persons, Indians, and non-Indians. 25 U.S.C. § 1302. "Tribal Courts have repeatedly been recognized as appropriate forums for exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians. *Martinez* at 436 U.S. 65.

The Fort Belknap Indian Community Tribal court was always open to Petitioners to adjudicate the contract dispute with the Housing Authority. However, from the beginning, Petitioners have attempted to subvert congressional intent, policy, and act, in addition to this Court's explicit interpretation of the Act, by racing to federal court with a cause of action exclusively within the jurisdiction of the Tribal court.

Petitioners have chosen to ignore the explicit language of this Court that "...Congress chose at this stage to provide for federal review only in habeas corpus proceedings." *Martinez*, supra, at 436 U.S. 71. They have instead turned inside out the purpose of the Act. Petitioners allege that "[T]o conclude that the Act withdrew from non-Indians the protection of the United States Constitution...and limited non-Indians to a tribal forum for vindication of their rights is to seriously misread the Act." (Petition for a Writ of Certiorari p. 7). That is to say this Court's explicit interpretation of the Act holding that the purpose of the Act was to impose certain restrictions on tribal governments similar to those in the Bill of Rights because "[A]s separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority" was wrong. But in fact the Act did not withdraw from non-Indians the protection of the United States Constitution precisely because the Constitution had never constrained Indian tribes. It added constraints that did not exist prior to its passage. This Court held that tribal forums were the appropriate forums to vindicate rights created by the ICRA and the only jurisdiction that would lie in federal court was that of habeas corpus.

Petitioners have simply refused to acknowledge that tribal forums apply the law of separate, independent sovereigns and that the federal constitution does not impose restrictions on a Tribe. The ICRA was passed to impose restrictions that the federal constitution did not impose. Federal courts have authority only to review federal habeas corpus actions. The ICRA and this Court's interpretation of it precludes jurisdiction in federal court over this matter.

C. There is no diversity jurisdiction in this case.

On page 10 of Petitioners' Petition for Writ of Certiorari, the Petitioners advanced the theory that Congress' plenary power in Indian affairs is implicit in 28 U.S.C. § 1332 and if the parties are diverse then federal district courts may exercise diversity jurisdiction. The Petitioners do not cite any authority which supports their proposition. On the contrary, all the authorities cited by Petitioners sustained the holding of the Ninth Circuit that diversity jurisdiction does not exist until the Fort Belknap Indian Community Tribal Court has ruled on its jurisdiction. 719 F 2d at 989 (9th Cir. 1983).

Petitioners' arguments, Petitioners' petition for Writ of Cert, p. 11, attempts to show that a conflict exists on this issue between the Ninth Circuit and 8th Circuit by citing *Poitra v. Demarrias*, 502 F. 2d 23 (8th Cir. 1974). Petitioners' argument must fail upon a close examination of the Ninth Circuit's opinion in this case and the opinion in *Poitra*, supra, 502 F 2d at 28, 29, n. 10.

The Eighth Circuit distinguished the Ninth Circuit's decisions of *Hot Oil Service, Inc. v. Hall*, supra, and *Littell v. Nakai*, supra, which had held that diversity jurisdiction does not lie in disputes which arise on an Indian reservation unless a state court has subject matter jurisdiction. The 8th Circuit in *Poitra*, supra, stated:

> We are mindful of the Ninth Circuit's decisions of Hot Oil Service, Inc. v. Hall, 366 F. 2d 295 (9th Cir. 1966), and Littell v. Nakai, 344 F. 2d 486 (9th Cir. 1965), both of which held that the federal district court could not assume diversity jurisdiction in disputes arising on the Navajo Indian

> Reservation unless the state courts also had subject-matter jurisdiction, citing Woods v. Interstate Realty Co., supra, 337 U.S. 535, 69 S. Ct. 1235, 93 L.Ed. 1524 (1949). Both of these cases can be distinguished. They were based on the concept of non-interference with tribal affairs that developed out of the Supreme Court's opinion in Williams v. Lee, 358 U.S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959). *However, in neither case was the court faced with the application of a state-created right under which an individual Indian sought to recover from another Indian.* In Hot Oil, the claim involved a lease agreement concerning facilities built on tribal land and subleased by a member of the tribe to a non-Indian. 366 F.2d at 296-297. In Littell, the plaintiff's complaint was based on a charge that the tribal chairman had tortiously interfered with the performance of a contract that the non-Indian had made with the tribe. 344 F.2d at 487. In both instances, the non-interference and tribal self-government policies from Williams are obviously in issue, and the refusal by the courts to accept jurisdiction seems correct under those facts. In the instant case, however, the facts are very different. (Emphasis added).

The claims involved in the instant case is identical to those in *Hot Oil* and *Littell*, supra. A contract to build housing on the Fort Belknap Reservation was entered into, performed, and breached on the Fort Belknap Indian Reservation. There is no state-created right involved. Therefore, it is clear that a conflict between the Eighth and Ninth Circuits does not exist.

The Ninth Circuit in this case set forth in detail how the assumption of diversity jurisdiction would interfere in tribal self-government. Even if diversity jurisdiction were possible, all the prerequisites specifically set out by the Ninth Circuit could not be met. 719 F2d at 983. The Respondents have maintained throughout the course of this litigation that the Fort Belknap Indian Community Tribal Court must be given an opportunity to determine whether or not it has jurisdiction in this matter. Further, this matter involves a consensual contract dispute between Indians and non-Indians and questions of law which only can be decided by the Tribal Court. The Ninth Circuit clearly pointed out that all the significant contacts occurred upon the Fort Belknap Reservation. 719 F2d. at 984, 985.

Further, Tribes retain all attributes of sovereignty which are not expressly divested by treaty, agreement or Congressional action: *Wheeler*, supra; *Washington v. Confederated Tribes of the Colville Indian Reservation*, 477 U.S. 134, 65 L. Ed. 2d 10, 100 S. Ct. 2069 (1980); *Montana v. United States*, 450 U.S. 544 (1981); *Confederated Salish & Kootenai Tribes v. Namen*, 665 F. 2d 951 (9th Cir. 1982); *See also Cardin v. De La Cruz*, 671 F. 2d 363 (9th Cir. 1982); and which are not implicitly divested. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S. Ct. 1011, 55 L. Ed. 2d 209 (1978).

This Court has applied two separate approaches to determine the extent to which Tribal sovereignty provides Indian tribes jurisdiction over non-Indians and their activities within Indian reservations. The first approach, articulated in *Washington v. Confederated Tribes of Colville*, supra, stated that Tribes have jurisdiction over non-Indians unless that jurisdiction had been limited by treaty or Congress, or the exercise of such jurisdiction "would be inconsistent with the over-riding interests of the National Government." 477 U.S. at 153. One year later, this Court held that where non-Indians were concerned, the Tribes' "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the Tribes, and so cannot survive without express Congressional delegation." *Montana v. U.S.*, 450 U.S. at 564.

In *Confederated Salish and Kootenai Tribes v. Namen*, supra, the Ninth Circuit acknowledged the tension between the differing approaches which this Court had said were to be employed in such cases. 665 F. 2d at 963. The Ninth Circuit employed the approach outlined in *Washington v. Colville Confederated Tribes*, supra: divestiture of only those powers inconsistent with overriding federal interests, at least where the non-Indian activity occurs on tribal or individual-trust land. 665 F.2d at 963-964. The Ninth Circuit recognized that the *Montana* rule, divestiture of powers not necessary for tribal self-government or internal control, is subject to two important exceptions. In *Montana*, supra, this Court stated:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians within their reservations, even on fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter *consensual commercial relationships* with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements. *Williams v. Lee*, 358 U.S. 217 (1959) (other citations omitted). A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. See *Fisher v. District Court*, 424 U.S. 382, 386 (1976); *Williams v. Lee*, 358 U.S. 217, 220 (1959) (other citations omitted). (Emphasis added).

Montana, 450 U.S. 554, 565.

This Court affirmed the Ninth Circuit's application of *Washington v. Colville*, supra, to tribal jurisdiction over non-Indians doing business within an Indian Reservation on trust land in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 71 L. Ed. 2d 21, 102 S. Ct. 894 (1982). This Court cited *Colville*, supra, with approval in upholding a tribal severence tax on oil and gas production on trust land where the tax fell on the non-Indian lessees.

Assertion of tribal jurisdiction over this dispute, which brought to Tribal Court by an Indian plantiff against a non-Indian defendant is not inconsistent with any overriding federal interests, *Washington v. Colville*, supra, and in fact is entirely consistent with the long standing federal policies of encouraging tribal self-government and self-determination. *Merrion v. Jicarilla Apache Tribe*, supra.

Even if a Tribe's jurisdiction over a contract dispute between an Indian plaintiff and a non-Indian defendant were to be viewed from the standpoint of the *Montana v. United States* rule, divesture of powers not necessary for tribal self-government or internal control, which should not be followed in this case, the Tribal Court would still have jurisdiction based upon both exceptions to the *Montana* rule. Petitioners

voluntarily submitted bids on the construction of the houses; they voluntarily entered into the construction contracts knowing they were to be performed on trust land within the Reservation and they entered into the contract with a Tribal entity (person). These facts clearly bring the non-Indian contractor within the jurisdiction of the Tribes under the first exception to the *Montana* rule.

Second, the contract was with a Tribal entity for the specific purposes of:

> (1) Remedying unsafe and unsanitary housing conditions that are injurious to the public health, safety and morals;
> (2) Alleviate the acute shortage of decent, safe and sanitary dwellings for persons of low income; and
> (3) Providing employment opportunities through the construction, reconstruction, improvement, extension, alteration or repair and operation of low income dwellings.

Tribal Ordinance No. 2-77, *Art. II.* Moreover, the Fort Belknap Indian Housing Authority was formed pursuant to tribal powers of self-government, in a conscious choice not to proceed under state law, *see* 24 CFR 805.108 (1980), and to address very specifically the economic (Article I (5)-Tribal Ordinance No. 2-77) and health and welfare needs (Article I (1, 2, 3, 4, and 6) of the Tribes. The activity out of which the present dispute arose bears directly upon the quality of the houses built under the contract. The Tribal government made a conscious choice not to organize the Housing Authority under state law. Therefore a dispute alleging breach of contract comes squarely within the second exception to the *Montana* rule. Thus the Tribal court has jurisdiction over said dispute and the non-Indian contractor.

The Tribal court has jurisdiction over any contract dispute arising out of the construction contracts of the local Indian Housing Authority within the reservation. Not only do the facts bring this case within the rule of *Colville* - inconsistent with over-riding federal interests - and within both exceptions to the *Montana* rule, but also jurisdiction of the tribe in

this case may well be an essential aspect of territorial management. *Merrion v. Jicarilla Apache*, supra; *Cardin v. DeLa Cruz*, 671 F.2d 363 (9th Cir. 1982), cert. denied, 459 U.S. 927 (1982); *See also Knight v. Shoshone and Arapahoe Indian Tribes*, 670 F.2d 970 (10th Cir. 1982); *Donovan v. Navajo Forest Products Industries*, 692 F.2d 709 (10th Cir. 1982). Therefore, this Court has held that disputes such as this is clearly within the jurisdiction of the Tribal court.

CONCLUSION

Respondents pray that the Writ of Certiorari not issue from this court and let stand the decision of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on October 31, 1983.

Respectfully submitted, this
28th day of June, 1984.

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